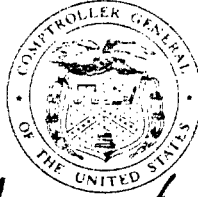


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D.C. 20548

15824
Martin
[Protest Against Rejection of Proposal]

FILE: B-197855

DATE: January 6, 1981

MATTER OF: GMS Gesellschaft Fuer Metallverarbeitung
mbH. & Co. *DL605731*

DIGEST:

1. Where communication to agency reflects that author's native language is not English but can be reasonably understood to question agency's action and to request agency's rationale therefor, protest filed within 10 days of agency reply is timely.
2. Where conversation between agency and low offeror affirmed agency's view that its proposal did not conform with RFP, agency properly rejected low offer and made award on initial proposal basis to next low offeror.

GMS Gesellschaft Fuer Metallverarbeitung mbH. & Co. (GMS) protests the rejection by the Air Force of its offer for swords submitted in response to request for proposals (RFP) No. F61546-79-R-0061 issued by the United States Air Force Contracting Center, Lindsey Air Station, Wiesbaden, Federal Republic of Germany. GMS protests the contracting officer's determination that GMS submitted an unauthorized alternate proposal and the rejection of its low priced offer without meaningful discussions. For reasons discussed below, this protest is denied.

The RFP called for fixed-price offers to furnish 1100 ceremonial swords, scabbards and cases in accordance with an attachment consisting of specifications and drawings. In addition, the RFP, which contained no technical evaluation criteria and did not require the submission of separate proposals, provided spaces for offerors to insert their unit and total prices for the swords. The solicitation stated that award would be made to that responsible

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offeror whose offer conforming to the solicitation would be most advantageous to the Government, price and other factors considered and warned that award might be made on the basis of initial offers without discussion.

Three offers were received by the Air Force; GMS at \$75,778, WK Stahl U. Metallwarevfabrik (WKC) at \$82,683 and E.u.F. Hoerster GmbH & Co. at \$97,319. GMS's offer consisted of the RFP with its prices inserted and a letter which stated:

"Please find enclosed the DD Form 1665 for this requirement in accordance with the relative terms. To avoid any misunderstanding or false deliveries please be reminded as follows:

- "1. The specification of this solicitation is in compliance with the content of our previous deliveries for this material. As you know we have supplied thousands of these swords during these years and have still abt. 1200 ea. in order for delivery before March 31, 1980.
- "2. The drawings of the solicitation do not correspond to the today's performance of the sword and we therefore have not considered these as to be regarded. They concern a model which is not more up-to-date.
- "3. You did receive a sample in compliance with the today's technical standards and deliveries performed."

The Air Force interpreted this letter as stating there was a discrepancy between the specifications and the drawings and that GMS would disregard the drawings since they were inconsistent with the swords it was then manufacturing and

had been supplying for several years. It reports the contracting officer called GMS to determine if GMS had made a mistake or intended to provide nonconforming swords and was informed that GMS' swords would not conform with the drawings. After a technical review confirmed that the specifications and drawings were compatible, accurate and representative of its minimum needs, the Air Force called GMS which, the Air Force states, again confirmed the non-conformance of the swords it intended to deliver and stated conforming swords would cost more and require later delivery. The agency then determined that GMS was offering an alternate item which could not be accepted and made award on the basis of initial proposals to WKC as the low offeror proposing swords in conformance with the RFP. Performance was completed by April 30, 1980.

The Air Force contends this protest, which was received in our Office on February 21, 1980, is untimely because it was received more than 10 days after January 25, when the contracting officer, during a visit to the GMS facility, first informed GMS its offer had been rejected as nonconforming and the contract had been awarded to another company. Also on January 25, GMS sent a telegram to the contracting officer acknowledging it had been informed of the award to another company, stating it had promised to deliver exactly in accordance with the requirements and asking for further details as to reasons for the rejection. Although this wire was not answered until February 12, the Air Force contends GMS must have realized on January 25 that the contract had been awarded without discussions on the basis of initial proposals, and that its proposal had been rejected because the Air Force believed it did not comply with all requirements.

Although GMS' telegram to the Air Force was clearly the product of an individual whose native language was not English, it did indicate that the author strongly disagreed with the Air Force's position and requested the reasons for the agency's decision. Since GMS' protest was filed within 10 days of its receipt of the Air Force's reply, it is timely and will be considered on the merits. See H.G. Fischer, Inc., B-193278, January 14, 1980, 80-1 CPD 38.

GMS objects to the agency's rejection of its proposal as nonconforming without providing that firm with the opportunity to submit a revised proposal. The protester argues that since the agency conducted some discussions concerning the acceptability of its proposal, the agency was obligated to inform GMS of any deficiencies in its proposal and provide that firm the chance to correct these deficiencies.

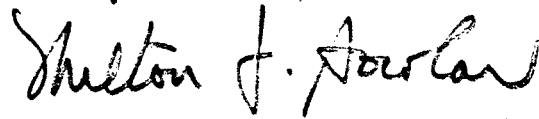
The Air Force contends it did not conduct discussions with GMS but only sought clarification of what GMS intended to deliver and that when it discovered the swords offered would not conform to the drawings, it awarded the contract, without discussions on an initial proposal basis, to the low conforming offeror.

Award may be made without discussions where it can be clearly demonstrated from the existence of adequate competition that acceptance of the most favorable initial proposal without discussions would result in a fair and reasonable price, provided that the solicitation advises offerors of the possibility that award might be made without discussions, and provided that award is in fact made without discussions. Telos Computing, Inc., 57 Comp. Gen. 370 (1978), 78-1 CPD 235; Defense Acquisition Regulation (DAR) § 3-805.3 (DPC 76-7, April 29, 1977).

The record indicates the contracting officer interpreted GMS' proposal as promising to provide swords which would not conform to the RFP. Despite GMS' argument that its proposed swords met the RFP specification requirements, in view of the letter submitted with its proposal and the agency's conversations with GMS, both of which indicated that the proposed swords would not conform with the RFP drawings (which the agency considered as an RFP requirement) the agency reasonably concluded that GMS' original proposal did not conform to the RFP, and therefore the agency was justified in rejecting it.

Finally, we point out that GMS' contention that the awardee did not provide swords in compliance with all requirements raises an issue with respect to contract administration which is not for resolution under our bid protest functions. Industrial Maintenance Services, Inc., B-195216, June 29, 1979, 79-1 CPD 476.

The protest is denied.

A handwritten signature in dark ink, appearing to read "Shelton J. Fowler". The signature is written in a cursive, flowing style.

For the Comptroller General
of the United States